

June 17, 2005

Norman Suydam, PE
LAN Engineering Corporation
1887 Business Center Drive, Suite 6
San Bernardino, CA 92408

**Re: Your Request for Advice
Our File No. A-05-103**

Dear Mr. Suydam:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May you, as a former senior transportation engineer with Caltrans, represent your current employer, Lim and Nascimento Engineering Corporation ("LAN") in work for a project management contract for Caltrans in District 8?

CONCLUSION

Assuming the permanent ban does not apply, you may work for LAN on the existing project management contract in District 8. However, under the one-year ban, you may not, as a paid employee of LAN, appear before or communicate with the Caltrans, if the communication or appearance is made for the purpose of influencing any legislative or administrative action of Caltrans, or influencing any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. See discussion below.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

You were employed at Caltrans as an engineer in various positions from June 1983 through March 2005. You stopped working as a Senior Transportation Engineer on January 7, 2005, but your official separation date was in March 2005.

Your current employer, Lim and Nascimento Engineering Corporation (“LAN”) was awarded a project management contract by Caltrans in District 8 in December 2004, while you were still employed by Caltrans and prior to your date of hire at LAN on January 10, 2005 as a quality control, quality assurance manager.

In a telephone conversation on May 26, 2005, you stated that prior to 1998, you administered architecture and engineering contracts and was considered a “designated employee” for purposes of Caltrans conflict of interest codes. However since, 1998 you have not been required to file Statements of Economic Interests (“SEIs”) or Form 700 documents. You also stated that the Caltrans list of designated employees includes only managers, supervisors and resident engineers and that it did not include your position.

Your last position with Caltrans was as a Senior Transportation Engineer (“TE”), Constructability Reviewer. You held this position from March 2002 through March 2005, when you officially left state service. As a Senior TE, you worked in the construction division where your sole duty was to review plans and specifications. You reviewed these plans to ensure that there were no errors and to ensure that the plans followed Caltrans’ policies, procedures and standards. In other words, you reviewed plans to ensure there was correct and sufficient information per Caltrans standards so that a contractor can bid on proposals and build the projects. You made recommendations regarding the plans, which would be forwarded to the designers of the projects. There are as many as 25 other divisions reviewing these plans at the same time your division reviews them. For instance, these other divisions review different aspects of the project, as such as issues dealing with electrical design, utilities and maintenance, among other things.

You wish to know whether you can represent your current employer, LAN in work for Caltrans in District 8, as a project manager.

ANALYSIS

Post-Governmental Employment Restrictions

Public officials who leave state service are subject to three types of post-governmental employment restrictions² under the Act:

² These restrictions are discussed in detail in the Commission’s fact sheet entitled, “Revolving Door and Other Post-Employment Issues,” a copy of which is enclosed.

One Year Ban: Section 87406 prohibits specified state employees, for one year after leaving state service, from being paid to communicate with their former agency in an attempt to influence legislative or administrative action or any action or proceeding involving a permit, license, contract or the sale or purchase of goods or property.

Permanent Ban: This rule prohibits a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated in while in state service. (See Sections 87401-87402, regulation 18741.1); and

Restrictions on Negotiating Prospective Employment: Restrictions on a public official who is negotiating or has any arrangement concerning prospective employment (Section 87407, regulation 18747).

We do not address restrictions in section 87407 involving influencing prospective employment since the Commission does not provide advice on any past conduct. Thus, we only address the one-year and permanent ban provisions of the Act.

The One Year Ban

Who is covered under the one-year ban?

The one-year prohibition applies to employees who are designated in their former agency's conflict of interest code. Your former position with Caltrans was not in the agency's conflict of interest code. However, the one-year ban also applies to employees who made or participated in the making of governmental decisions that had a reasonably foreseeable material effect on any financial interest. In other words, the one-year prohibition applies to former state employees who *should have been designated* in their former employer's code. (Section 87406(d)(1); regulation 18746.1(a)(2), copy enclosed.)

A state employee "makes a governmental decision" when, acting within the scope of his or her authority, he or she: 1) votes on a matter; 2) appoints a person; 3) obligates his or her agency to any course of action; 4) enters into any contractual agreement on behalf of his or her agency; or 5) determines not to act, unless the determination is made due to a conflict of interest. (Regulation 18702.1 (copy enclosed).)

A state employee "participates in making a governmental decision" when he or she negotiates (without significant substantive review) with a governmental entity or private person regarding a governmental decision, or when he or she advises or makes recommendations to the decisionmaker (either directly or without significant substantive review), by conducting research or an investigation or by presenting any report, analysis or opinion, which requires the exercise of independent judgment on the part of the employee and the outcome or purpose of which is to influence the decision. (Regulation 18702.2 (copy enclosed).)

We have advised that an employee participates in the making of a governmental decision, even if it is reviewed by several of his superiors, if any of the following apply: 1) the superiors rely on the data or analysis prepared by the employee without checking it independently; 2) the superiors rely on the professional judgment of the employee; or 3) the employee in some other way actually influences the final decision. (*Lilyquist* Advice Letter, No. M-96-318 [Memorandum to the Attorney General].)

You have stated that you have not been required to file a statement of economic interests for at least several years and that you were not required to do so because you were not a “designated employee” under the Caltrans conflict of interest code.

However, from the facts provided in your letter and telephone conversations with you on May 26, 2005 and June 3, 2005, it appears that your position as a Senior TE, Constructability Reviewer should have been designated in Caltrans’ conflict of interest code. Your sole duty was to review plans and make determinations as to which plans and specifications met Caltrans standards. You also made recommendations to the designers of these projects. Decisions concerning the completeness, accuracy and suitability of plans are decisions that financially affect the persons drafting and proposing these plans. Moreover, nothing in your facts indicate that the Caltrans has made a determination that your position was properly not designated in its conflict of interest code.

Therefore, even if your specific position is not included in Caltrans’ conflict of interest code, pursuant to the requirements of section 87302, the one-year ban would apply to you because it appears you held a position at Caltrans that entailed the making or participation in the making of governmental decisions. (Section 87406(d)(1); regulation 18746.1(a)(2); *Unterreiner* Advice Letter, No. I-98-299.)

What conduct is prohibited by the one-year ban?

For one year after leaving state service, a former state employee, as specified, may not communicate with his or her former agency³ in an attempt to influence any transaction involving legislative or administrative action or other specified action (including contracts). The one-year period commences when the employee is no longer under an employment agreement and is no longer receiving compensation, including compensation for “unused” vacation time. (*Weil* Advice Letter, No. A-97-247.)

However, not all communications to a former state administrative agency employer are prohibited by the one-year ban. The ban extends only to those communications for the purpose of influencing any legislative or administrative action, or influencing any discretionary act “involving the issuance, amendment, awarding, or

³ A designated employee’s “former agency” is any state agency the employee worked for or represented during the 12-month period before leaving state service.

revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.” (Section 87406(d)(1); regulation 18746.1(b)(5).)

An appearance or communication before a former state administrative agency employer, made as part of “services performed to administer, implement, or fulfill the requirements of an *existing* permit, license, grant, *contract*, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

You asked about an *existing* project management contract with Caltrans in District 8 that was awarded to your current employer, LAN, prior to your date of hire at LAN on January 10, 2005 as a quality control, quality assurance manager. Thus, if your communications with personnel of Caltrans will be for the purpose of administering, implementing, or fulfilling the requirements of a *pre-existing contract* or project between LAN and Caltrans, they are *not* prohibited by the one-year ban so long as the services do not involve the issuance, amendment, awarding, or revocation of a permit, license, agreement or contract, or the sale or purchase of goods or property. This is a fact-specific analysis. However, these activities would be prohibited under the permanent ban if, while in state service, you participated in the proceedings as discussed below.

The Permanent Ban

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial or other proceeding in which you participated while a state administrative official at Caltrans or any other state agency. (Sections 87401 and 87402.) In other words, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400 defines “*state administrative agency*” as “every state office, department, department, division, bureau, board commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.” A “*state administrative official*” is defined under this section as “every member, officer, *employee or consultant of a state administrative agency* who as apart of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely secretarial or ministerial capacity.”

As a former Senior TE with Caltrans, you are a former state administrative official for purposes of the Act. Therefore you are subject to the permanent ban. (Section 87400(b).)

To apply the permanent ban to your situation, you need to identify the proceedings in which you participated while employed by the state. “Participated” is defined at section 87400(d), as follows:

“‘Participated’ means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.” (See also regulation 18741.1.)

You stated that as a Senior TE, Constructability Reviewer for Caltrans, you reviewed plans and specifications for design of transportation projects. You stated that you were not a supervisor or manager in this position. However, you provided an oversight role on transportation projects designed by private engineering consulting firms. Thus, you would be prohibited under the permanent ban from doing work for LAN with regard to specific projects in which you have participated while employed at Caltrans.

You have not provided any facts, or details about specific projects that appear to implicate this prohibition. Nevertheless, you should be aware of this provision as it is specifically applicable to any contractual decisions in which you may have participated as a former Senior TE with Caltrans.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosures

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